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PROCEDURES AND MECHANISMS RELATING TO COMPLIANCE UNDER THE KYOTO PROTOCOL

Note by the co-Chairmen of the Joint Working Group on Compliance

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I. INTRODUCTION

A. Mandate

1. At the eleventh sessions of the subsidiary bodies, the Joint Working Group on Compliance (JWG) requested the co-Chairmen, with the assistance of the secretariat, to further develop the elements of procedures and mechanisms relating to a compliance system under the Kyoto Protocol, based on the elements of a compliance system and synthesis of submissions contained in document FCCC/SB/1999/7 and Add.1, the discussions held at the eleventh sessions of the subsidiary bodies and further proposals from Parties.[1] The JWG also invited Parties to submit any further proposals on compliance by 31 January 2000.[2]

B. Scope of the note

2. The co-Chairmen have consulted widely in order to fulfil their mandate of developing the elements of procedures and mechanisms relating to compliance. As requested by the JWG,[3] a workshop on matters related to a compliance system was held from 1 to 3 March 2000. The discussions at the workshop provided valuable inputs to the co-Chairmen in their work.

3. This note sets out, in section II, the requisite elements of a compliance system for the Kyoto Protocol. It reflects an emerging consensus on the overall structure of a compliance system described here by means of headings. Under these headings (each of which has a roman numeral) there are some parts where distinct options have been identified; some parts where the views of Parties still diverge and the ideas have merely been listed; and other parts where there is need for further discussion before ideas can be listed or precise options identified.

4. Some of the elements will need to be examined in greater detail at the twelfth sessions of the subsidiary bodies. For example, most Parties have proposed a compliance system that will involve the operation of one or more branches, components or procedures for the general treatment of cases. Parties need to discuss how cases will move from one branch, component or procedure to another, and the expected time-frame for the consideration of cases. Further discussion is needed on the way in which, and the extent to which, breaches of eligibility requirements under the Kyoto mechanisms would be addressed within the compliance system. The form and nature of any review or appeal, as well as what should be the role of the COP/MOP, need to be further elaborated. Also, a clarification of views would be required for the outcomes or consequences of non-compliance or potential non-compliance. It will be necessary, for example, to work out which outcomes or consequences would be predetermined

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[1] FCCC/SBI/1999/14, para. 84 (d).

[2] FCCC/SBI/1999/14, para. 84 (b). Submissions received from Parties are contained in document FCCC/SB/2000/MISC.2.

[3] FCCC/SBI/1999/14, para. 84 (c).

and the amount of discretion that the branches, components or procedures should have in applying outcomes or consequences.

5. Certain procedural and operational matters regarding the compliance system may be more appropriately dealt with in the rules of procedure of the compliance institution. When preferences of Parties with regard to these matters have become clearer, the procedural and operational matters in question could be developed in a separate instrument.

C. Possible action by the Joint Working Group

6. In considering the elements set out in this note, the JWG may wish to focus first on the matters covered in paragraph 4 above. With a view to completing its work in accordance with decisions 8/CP.4[4] and 15/CP.5,[5] the JWG may wish to request the co-Chairmen to develop the text of a compliance system for the Kyoto Protocol for consideration during the thirteenth sessions of the subsidiary bodies, taking into account the discussion at the twelfth sessions.

II. ELEMENTS OF A COMPLIANCE SYSTEM FOR THE KYOTO PROTOCOL

I. Objective

To facilitate and promote compliance with the commitments under the Kyoto Protocol, in particular the commitment under Article 3.1 of the Protocol.[6]

II. Nature

Option 1

The nature of the compliance system should be set out in the text, indicating that it should be, for example, credible, coherent, comprehensive, unified, effective, predictable, transparent, simple, based on principles reflecting the precautionary approach, etc.

Option 2

The nature of the compliance system should not be expressly provided for in the text, as it could be implicit from the content of the text, or be reflected in the preamble or in a decision accompanying the adoption of the compliance system.

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[4] FCCC/CP/1998/16/Add.1

[5] FCCC/CP/1999/6/Add.1

[6] All articles referred to in this note are those of the Kyoto Protocol.

III. Principles

Option 1

Principles governing the operation of the compliance system should include, for example:

1. Due process;
2. Proportionality;
3. Common but differentiated responsibilities ;
4. Equal treatment of Parties undertaking the same commitments under the Protocol;
5. Preservation of the sovereign rights and obligations of Parties in or under the Protocol;
6. Other general principles of customary international law.

Option 2

Principles governing the operation of the compliance system should not be expressly provided for in the text, as they could be implicit from the content of the text, or be reflected in the preamble or in a decision accompanying the adoption of the compliance system.

IV. Scope of application

The compliance system should apply to all commitments under the Protocol; distinct treatment may be applied to some specified commitments.

V. Establishment of a compliance institution

1. A compliance institution should be established.

2. The compliance institution should consist of one or more branches, components or procedures.[7]

VI. Functions of a compliance institution

1. To decide which referrals to pursue in accordance with agreed criteria;
2. To provide individual Parties with advice on and facilitate assistance in overcoming difficulties in fulfilling their commitments under the Protocol;

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[7] If the compliance institution were to consist of two or more branches, components or procedures, the facilitative and quasi-judicial functions listed in part VI could be allocated to the respective branch, component or procedure of the compliance institution. The structure of the compliance institution in terms of specific activities to be covered in the text (for example, referral, screening, general procedure for cases, rules of procedure, specific outcomes or consequences and the role of the COP/MOP), may depend on the functions to be performed by the respective branch, component or procedure.

3. To address specified cases arising under the Kyoto mechanisms, including Article 6.4 of the Kyoto Protocol;
4. To address eligibility requirements contained in and under the Kyoto mechanisms, including determining that a suspended Party may resume use of one or more such mechanisms;
5. To address cases of non-compliance by individual Parties;
6. To determine and/or apply appropriate outcomes or consequences.

VII. Structure of the compliance institution[8]

1. Membership [...] [10] [12] [15] [21]

2. Capacity in which members act:

Option 1

- As experts nominated by Parties to act in their personal capacity.

Option 2

- As representatives of Parties.

3. Composition based on:

Option 1

- Equitable geographical representation.

Option 2

- One half to be designated by Annex I Parties and one half to be designated by non-Annex I Parties.

Option 3

- A larger proportional representation from Annex I Parties.

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[8] See footnote 7.

4. Expertise:

- Scientific, technical, legal, socio-economic, etc.

5. Length of membership:

- Specified number of years [2] [3] [4]; possibility of re-election for one additional term; rotation to ensure continuity.

VIII. Referral[9]

Referral of questions to the compliance institution:

1. Reports by expert review teams under Article 8 of the Protocol;
2. Questions raised by a Party with respect to itself ;
3. Questions raised by a Party with respect to another Party (under certain circumstances);
4. Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (COP/MOP);
5. UNFCCC secretariat.

IX Screening[10] - preliminary evaluation of questions

1. To be performed by:

Option 1

- The compliance institution.

Option 2

- COP/MOP, or a panel set up by the COP/MOP.

2. Criteria for screening:

To screen out:

- *de minimis* questions, and
- unfounded questions.

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[9] See footnote 7.

[10] See footnote 7.

3. Allocation of cases:

If the compliance institution consists of more than one branch, component or procedure, it would need to be decided which branch, component or procedure should consider the case in question.

X. General procedure for handling of cases

If the compliance institution consists of more than one branch, component or procedure, it would need to be decided how cases would move from one branch, component or procedure to another.

XI. Expedited procedure for cases related to the Kyoto mechanisms

1. Meetings:

- Meetings should be convened and concluded within the timetable referred to below;
- Meetings may be conducted through electronic means.

2. Timetable for each step:

- Convening of meetings;
- Deliberation;
- Issuance of the conclusion;
- Appeal or review, if any;
- Declaring that a Party may resume use of one or more of the Kyoto mechanisms.

3. Other

XII. Procedure for appeal

Option 1

- Establish a standing or ad hoc appellate body.

Option 2

- COP/MOP to act as appellate body (for certain conclusions or recommendations from the compliance institutions).

Option 3

- No procedure for appeal.

XIII. Rules of procedure for the compliance institution

1. Decision-making:

Option 1

- By consensus.

Option 2

- By [...] majority of the members of the compliance institution present and voting.

Option 3

- According to the rules of the COP/MOP.

2. Due process:

- Party's entitlement to participate, including Party's right to nominate a person to represent it, to rebut evidence and to comment on any draft conclusions or recommendations.

3. Avoidance of conflicts of interest:

- Members of the compliance institution may not take part in the consideration of matters involving the country of which they are a national.

4. Sources of information:

- Reports by expert review teams under Article 8 of the Protocol;
- Information provided by Parties concerned;
- Outside experts and organizations;
- Any other source that the compliance institution considers to be appropriate.

5. Frequency of meetings:

- As necessary, at least [once] [twice] a year.

6. The compliance institution to report on its activities to each ordinary session of the COP/MOP.

XIV. True-up period

1. A specified time period after the end of the commitment period during which a Party may take additional steps to remain in compliance without incurring consequences for non-compliance.

2. Use of voluntary fund.

XV. Outcomes or consequences of non-compliance or potential non-compliance[11]

1. Provision of advice and facilitating assistance;
2. Publication of non-compliance or potential non-compliance;
3. Issuing of cautions;
4. Recommendation of policies and measures;
5. Compliance action plan;
6. Loss of eligibility to participate in one or more of the Kyoto mechanisms based on failure to meet certain eligibility requirements;
7. Application of Article 4.5 if one or more Parties are not in compliance with Articles 5 and 7;
8. Loss of ability to transfer part of assigned amount until a Party has demonstrated that it will have a surplus;
9. Loss of access to the Kyoto mechanisms as a result of failure to meet the obligations under Article 3.1;
10. A Party that has exceeded its assigned amount at the end of the commitment period should be subject to subtraction of tonnes from its assigned amount in a subsequent commitment period and will lose its ability to transfer part of its assigned amount under emissions trading until it has demonstrated that it will have a surplus in its assigned amount in that subsequent commitment period;
11. Subtraction of excess tonnes from a Party's assigned amount for the subsequent commitment period, with a penalty;
12. Suspension of rights or privileges;
13. Variation of compliance fund;
14. Financial penalty.

XVI. COP/MOP

1. To provide general policy guidance or background to the compliance institution;
2. To receive reports from the compliance institution;

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[11] Different outcomes or consequences may be applied by different branches, components or procedures. Some outcomes or consequences may be predetermined for certain types of violation. Certain consequences may relate solely to the eligibility requirements of the Kyoto mechanisms. In certain cases it may be appropriate for two or more of the outcomes or consequences to be applied in combination. Also, a menu approach may be used. The implications of Article 18 may need to be further discussed.

3. To consider the conclusions of the compliance institution, including any implications for the work of the subsidiary bodies;
4. To accept the report of the compliance institution unless the COP/MOP decides by consensus not to do so.

XVII. Secretariat

1. To channel information to the compliance institution;
2. To service the meetings of the compliance institution;
3. To act as the channel of communication with other Protocol bodies.

XVIII. Relationship with Article 16 of the Protocol

XIX. Relationship with Article 19 of the Protocol

The compliance system should operate without prejudice to Article 19 of the Protocol.

XX. Evolution of the compliance system under the Protocol

The compliance system may be modified by consensus of the Parties to the Protocol, taking into account any amendments to the Protocol, decisions of the COP/MOP and experience gained with the working of the process.

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